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DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SEVENTH SESSION

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CHAPTER V

STATE SUCCESSION AND ITS IMPACT ON THE NATIONALITY OF NATURAL AND LEGAL PERSONS

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A. Introduction

1. At its forty-fifth session, in 1993, the Commission decided to include in its agenda the topic entitled "State succession and its impact on the nationality of natural and legal persons". 1/ The General Assembly endorsed the Commission's decision in paragraph 7 of resolution 48/31 of 9 December 1993, on the understanding that the final form to be given to the work on the topic shall be decided after a preliminary study is presented to the Assembly.

2. At its forty-sixth session, in 1994, the Commission appointed Mr. Václav Mikulka Special Rapporteur for the topic. 2/ In paragraph 6 of its resolution 49/51 of 9 December 1994, the General Assembly endorsed the intention of the Commission to undertake work on the topic, on the understanding, once again, that the final form to be given to the work on this topic shall be decided after a preliminary study is presented to the Assembly, and requested the Secretary-General to invite Governments to submit by 1 March 1995 relevant materials, including national legislation, decisions of national tribunals and diplomatic and official correspondence relevant to the topic.

B. Consideration of the topic at the present session

3. At the present session, the Commission had before it the Special Rapporteur's first report (A/CN.4/467), which it considered at its 2385th and its 2387th to 2391st meetings, held between 17 and 30 May 1995. A summary of the Commission's debate is to be found in subsection 1 below.

4. At its 2393rd meeting, on 1 June 1995, the Commission decided to establish a Working Group on this topic. 3/ The Working Group was entrusted with the mandate to identify issues arising out of the topic, categorize those issues which are closely related thereto, give guidance to the Commission as to which issues could be most profitably pursued given contemporary concerns and present the Commission with a calendar of action.

1/ Official Records of the General Assembly, Forty-eighth session, Supplement No. 10 (A/48/10), para. 440.

2/ Ibid., Forty-ninth session, Supplement No. 10 (A/49/10), para. 383.

3/ For the composition of the Working Group, see para. .. above.

5. The report of the Working Group, which is annexed to this report, was examined by the Commission at its 2411th and 2413th meetings, held on 5 and 7 July 1995. A summary of that debate is to be found in subsection 2 below.

1. Consideration of the first report of the Special Rapporteur

(a) Presentation of the first report by the Special Rapporteur

6. The Special Rapporteur pointed out that the topic under consideration stood at the point where two other topics previously considered by the Commission intersected, namely the question of nationality, including statelessness, and the question of State succession. The consideration of those questions had led to the adoption of the 1961 Convention on the Reduction of Statelessness, the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts. In the opinion of the Special Rapporteur, however, the topic under consideration fell more within the branch of international law concerning nationality rather than within State succession. In comparison with the topic of "Nationality, including statelessness", it was both broader, since it covered all of the issues resulting from changes of nationality and not simply statelessness, and more limited, since it covered only changes of nationality resulting from State succession and thus having the character of collective naturalizations.

7. The Special Rapporteur emphasized that, in contrast to international treaties or debts, which entailed an international legal relation subject to transfer, nationality was always inherent in character and excluded a priori any notion of "substitution" or "devolution".

8. With regard to the Commission's working method, the Special Rapporteur advocated a flexible approach, involving codification and progressive development of international law. As to the form which the outcome of the work on the topic might take, the Special Rapporteur recalled that the Commission had agreed to postpone a decision on that point and that the General Assembly would take its decision only after a preliminary study was submitted to it.

9. The Special Rapporteur considered that, in order to ensure uniformity of terminology, the Commission should continue to use the definitions it had formulated previously in the context of the two Vienna Conventions on succession of States, particularly with regard to the basic concepts, defined in article 2

of both Conventions, and especially the definition of the expression "succession of States". As explained in the commentary, the expression was used as referring exclusively to the fact of the replacement of one State by another in the responsibility for the international relations of territory, leaving aside any connotation of inheritance of rights or obligations on the occurrence of that event, the word "responsibility" not being intended to convey any notion of "State responsibility". The Commission had considered that expression preferable to such expressions as "replacement in the sovereignty in respect of territory". The meanings attributed to the terms "predecessor State", "successor State" and "date of the succession of States" were merely consequential upon the meaning given to the expression "succession of States".

10. Chapter I of the report, entitled Current relevance of the topic, mentioned some of the international bodies that had concerned themselves with the problem of nationality in relation to recent territorial changes. It highlighted the importance of the problem from the point of view of the practical needs of the international community and spoke of international symposia and meetings whose records might benefit the Commission in its work on the topic.

11. Chapter II was on the concept and function of nationality. It stressed the need to draw a clear distinction between the nationality of natural persons and that of legal persons. As to the nationality of natural persons, the various components of the concept of nationality had been identified by the International Court of Justice in the Nottebohm case. 4/ According to the definition given by the Court, nationality was "a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State".

12. The Special Rapporteur emphasized that the concept of nationality could be defined in widely differing ways, depending on whether the problem was approached from the standpoint of internal law or international law. Seen from the

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4/ I.C.J. Reports, 1955, p. 23.

standpoint of international law, to the extent that individuals were not direct subjects of international law, nationality was the medium through which they could normally enjoy benefits from international law, whereas, in internal law, the function of nationality was different and there could be various categories of "nationals", as had been the case in the federal States of Eastern Europe.

13. Legal persons needed a nationality for the purposes of the application of international law and more particularly the purposes of diplomatic protection, but the analogy between natural persons and legal persons should not be taken too far. It was the usual practice of States to specify the categories of legal persons they considered as having their nationality for the purposes of the application of a particular treaty or of a domestic law. Since a legal person could have links with several States, a balance had to be struck between various factors in order to determine its nationality. In the opinion of the Special Rapporteur, a study of the effects of State succession on the nationality of natural persons was more urgent and should take priority over the separate problem of the nationality of legal persons.

14. Chapter III, on the respective roles of internal law and international law, pointed out that the identification of a State's nationals fell within the internal law of that State, not within international law, including in the case of State succession. As confirmed by article 1 of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, the Advisory Opinions of the Permanent Court of International Justice with regard to the nationality decrees issued in Tunis and Morocco, 5/ and the acquisition of Polish nationality 6/ and the Judgment of the International Court of Justice in the Nottebohm case, 7/ it was for the internal law of the predecessor State to determine who had lost its nationality and for the internal law of the successor State to determine who had acquired its nationality, following the change. The idea that, in exceptional cases, individuals could possess a nationality for

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5/ P.C.I.J. 1923, Series B, No. 4, p. 24.

6/ Ibid., No. 7, p. 16.

7/ I.C.J. Reports, 1955, p. 4.

international purposes in the absence of any applicable nationality law raised a particularly important question in the context of State succession, namely the existence of two distinct concepts of nationality - one under international law and another under internal law. The elements and function of the former still had to be clarified.

15. While the discretionary power of the State with regard to nationality was not absolute, international law introduced only two types of limitations, first, the delimitation of competence between States, and second, the obligations associated with the protection of human rights. International law could in no case substitute for internal legislation by indicating which individual was or was not a national. It was exercised through customary rules - still quite rudimentary - and treaty rules aimed at the harmonization of national legislations with a view to eliminating, inter alia, statelessness and dual nationality. 8/ Those treaty rules could not only provide guidance for national legislators in search of solutions to problems arising from territorial change, but also, where the predecessor State was bound by them, be binding on successor States under the rules of international law applicable to State succession in respect of treaties.

16. The Hague Convention also mentioned "the principles of law generally recognized with regard to nationality" as being among the limitations to which the freedom of States was subjected in the area of nationality, but remained silent on the precise content of that concept, which the Commission might usefully try to spell out.

17. The limitations on the freedom of States in the area of nationality, discussed in chapter IV, included, first of all, those stemming from the principle of effective nationality based on the concept of a genuine link (cf. the Judgment of the International Court of Justice in the Nottebohm case)

8/ Conventions cited by the Special Rapporteur included the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, its Protocol relating to Military Obligations in Certain Cases of Dual Nationality, its Protocol relating to a Certain Case of Statelessness and its Special Protocol concerning Statelessness, the 1954 Convention relating to the Status of Stateless Persons, the 1962 Convention on the Reduction of Statelessness and certain regional conventions.

and then the limitations resulting from some obligations of States in the field of human rights. In that context, the report mentioned article 15 of the Universal Declaration of Human Rights and articles 8 and 9 of the Convention on the Reduction of Statelessness. The Commission could, in the Special Rapporteur's opinion, study the precise limits of the discretionary power of the predecessor State to deprive of its nationality the inhabitants of the territory it had lost, as well as the question whether an obligation of the successor State to grant its nationality to those inhabitants could be deduced from the principles set out in the relevant conventions.

18. With regard to categories of succession, the subject of chapter V, the Special Rapporteur held the view that the problems of nationality arising in the context of different types of territorial change must be addressed case by case in order to establish whether the principles pertaining to universal succession applied mutatis mutandis to the effects of partial succession on nationality. He pointed out that the 1978 Vienna Convention differentiated between succession in respect of part of territory, newly independent States, and uniting and separation of States, but that the 1983 Vienna Convention subdivided those categories in the following manner: so far as succession in respect of part of territory was concerned, it dealt separately with the case where part of the territory of a State was transferred to another State, with the case where a dependent territory was integrated with a State other than the colonial State, and with the case where a part of the territory separated and united with another State's and so far as the separation of States was concerned, the Convention differentiated between the separation of part or parts of the territory of a State and the dissolution of a State. In the Special Rapporteur's view, those categories were more appropriate for the purposes of the study of the impact of State succession on nationality, inasmuch as the continuity or discontinuity of the international personality of the predecessor State in cases of secession or dissolution of States had direct implications in the area of nationality and the issues which arose in the first case were by nature rather different from those which arose in the second case. Moreover, in the case of a uniting of States, a distinction should be made between the situation in which a State united freely with another State, so that it alone disappeared as a subject of international

law - the "absorption" hypothesis - and the situation in which the two predecessor States united to form a new subject of international law and therefore both disappeared as sovereign States.

19. The Special Rapporteur recommended, on the one hand, that the nationality issues which had arisen during the decolonization process should be studied only in so far as such study shed light on nationality issues common to all types of territorial change and, on the other, that only the case of a succession of States occurring in conformity with international law should be considered.

20. With regard to chapter VI, concerning the scope of the problem under consideration, the Special Rapporteur noted that, ratione materiae, change of sovereignty affected all individuals susceptible of losing the nationality of the predecessor State and all individuals susceptible of obtaining or acquiring the nationality of the successor State - two categories that would not necessarily be identical. Ratione materiae, it should be determined to what extent the loss of the nationality of the predecessor State occurred automatically, as a logical consequence of the succession of States, and to what extent international law restricted the predecessor State's freedom of action in regard to withdrawal of its nationality. Acquisition of the nationality of the successor State could also be a source of problems as, for instance, where two or more successor States came into being on the dissolution of a State and the range of individuals susceptible of acquiring the nationality of any one of them had to be defined. Should an obligation to negotiate be imposed on the States concerned, with a view to resolving nationality issues by mutual agreement? Should a right of option be envisaged, as it recently had been by the Arbitration Commission of the European Community Conference on Yugoslavia? Lastly, in the view of the Special Rapporteur, the scope of the study ratione temporis should exclude questions relating to changes of nationality that occurred prior to or following the date of the succession of States. It should not be forgotten, however, that successor States often took time to adopt their laws on nationality and that, in the interim period, problems concerning nationality could arise which, though not resulting directly from the change of sovereignty, none the less deserved the Commission's attention.

21. In regard to chapter VII, entitled Continuity of nationality, the Special Rapporteur stressed that neither practice nor doctrine provided a clear answer to the question whether the rule of the continuity of nationality, which formed part of the regime of diplomatic protection, applied in the event of involuntary changes in nationality brought about by State succession. There were good reasons for answering that question in the negative. It should perhaps therefore be included in the scope of the topic under consideration.

(b) Summary of the debate

(i) General observations

22. The Special Rapporteur was generally praised for his comprehensive, clear and stimulating report on a complex topic.

23. Nationality, it was stated, stood at a crossroads between domestic law, private international law and public international law. It also stood, as pointed out by the Special Rapporteur, at the crossroads of three significant branches of international law: nationality law, the law of State succession and international human rights law. In that connection, it was considered important not to give undue weight to the law on nationality and to take due account of the humanitarian aspect of the question. A firm approach to the question was also recommended

(ii) Preliminary study requested by the General Assembly and outcome of the Commission's work on the topic

24. The view was expressed that the preliminary study requested by the General Assembly should not be of an abstract and academic nature, but should rely on recent State practice and focus on the advantages and drawbacks of the actual solutions adopted by States. The Special Rapporteur, while acknowledging that national legislation should be closely examined in due course, cautioned the Commission against setting itself up as a court of State practice in the area of nationality.

25. Some members held that the Commission should present the Assembly with a number of options and possible solutions, but there was also the view that it would be preferable to merely identify the problems as a first step. According to another view, the Special Rapporteur's first report as such should be regarded as constituting a preliminary study, on the understanding that the reactions of members should be reflected in the report of the Commission to the General Assembly.

26. Some members made preliminary remarks on the issue of the outcome of the work on the topic. It was felt that the elaboration of a treaty was a lengthy process which could not respond to the present and pressing need of certain States for criteria that should guide their conduct in the area under consideration. The point was further made that the outcome of the Commission's

earlier work on State succession suggested the need for the utmost prudence before embarking on the elaboration of new instruments.

27. It was suggested that the Commission should draw up a list of principles to be laid down in agreements concluded between States. It was also proposed that the Commission should focus on general factors or criteria, which States would be free to adapt to specific cases. Another suggestion was to consider a series of presumptions, for instance, the presumption that every person has the right to a nationality, that every person has, in fact, a nationality, that no person should become stateless as a result of State succession, that a nationality acquired as a result of State succession is effective from the date of succession, and that the nationality of a person is that of the strongest attachment.

28. As to the method of work, the idea was expressed that the Commission might adopt a mixed approach in its consideration of the topic, in other words, it could base itself partly on lex lata and partly on lex ferenda.

(iii) Terminology

29. On the question whether the Commission should, as proposed by the Special Rapporteur, retain the definition of the term "succession of States" embodied in the 1978 and the 1983 Conventions, a view was expressed that, since nationality was a matter that fell essentially within the sovereignty of a State, a formula like "the replacement of one State by another in sovereignty in respect of territory" would be more appropriate. That proposal gave rise to objections. It was said, in this connection, that the definition under the 1978 and the 1983 Vienna Conventions had proved its worth, was in common use in inter-State practice, and was adapted to very different situations, including decolonization, unlike the proposed new definition.

30. The question was also raised whether it might not be preferable to start out with special definitions suited to the topic under consideration.

(iv) Categories of succession

31. The point was made that the Commission should clearly set forth the various categories of State succession it would analyse. While it was argued that, for this purpose, the Commission should draw elements from both the 1978 and the 1983 Conventions, support was also expressed for the Special Rapporteur's recommendation that the Commission consider the existing categories of succession

laid down in the 1983 Convention, but making a clear distinction between unification and absorption. That Convention, it was stated, was the right instrument to follow because, in principle, the problems of succession with respect to matters other than treaties, which had an impact in both the internal and the international domain, were in a certain sense closer to problems regarding nationality. It was also noted that the clear distinction made in the more detailed typology of the 1983 Convention between cases of State succession where the predecessor State disappeared and cases where such State continued to exist was of some importance as far as nationality was concerned.

32. Agreement was also expressed with the Special Rapporteur's recommendation that, as had been the case with regard to its previous work on State succession, the Commission should leave aside cases of unlawful succession which presented additional problems outside the scope of the topic under consideration. It was nevertheless recognized that such exclusion did not rule out the possibility that particular solutions applicable in cases of lawful State succession might also be applicable in the case of unlawful succession. The remark was made in this context that it was precisely in the latter case that criteria for State conduct were in need of elaboration in order to prevent human rights violations.

33. The Special Rapporteur's suggestion that, as the decolonization process had now been completed, the Commission should limit its study to issues of nationality that had arisen during that process only in so far as it was necessary to shed light on nationality issues common to all types of territorial change, was supported by some members but questioned by others.

(v) The treatment of natural persons and legal persons

34. Several members agreed with the Special Rapporteur's recommendation that the Commission should deal separately with the nationality of natural persons and the nationality of legal persons and should concentrate first on the former. It was argued, in particular, that natural persons - i.e., the population - constituted one of the essential elements on which the very existence of a State depended, that natural persons were more likely than legal persons to suffer in the event of a succession of States and that legal persons did not necessarily have the same nationality in all their legal relations.

35. There was also the view that, even if the Commission dealt first with the nationality of natural persons, it should not, in its preliminary study, ignore legal persons. The point was made that, while some legal systems did not regulate the nationality of corporations internally, international law did, for its own purposes, attribute to such legal persons a nationality which was likely to be affected by State succession. It was further remarked that the problem of the nationality of legal persons was perhaps not so different from that of the nationality of natural persons and consequently that the Commission should, from the very beginning, seek to determine whether there were common principles applicable to the nationality of both legal and natural persons.

36. The point was also made that, because the relevant practice of States presented many common elements, the issue of the nationality of legal persons offered more fertile ground for codification in the traditional sense than that of the nationality of natural persons, which, due to the wide variety and sensitiveness of individual situations, required a case-by-case approach and would be more appropriately dealt with in the framework of a study.

(vi) The question whether the Commission should address the issue of the rule of the continuity of nationality in the case of State succession

37. Several members agreed that the consequences of State succession on the right to diplomatic protection merited some attention. In particular, it would be appropriate, it was said, to make the rule of continuity apply only to situations where a change of nationality came about through the free choice of an individual and not as a result of a transfer of territory. The Commission was, however, cautioned in that regard against the temptation to embark on consideration of the law of diplomatic protection in its entirety.

38. It was pointed out that the problem of continuity had two aspects: continuity in respect of acts occurring prior to the date of the succession; and continuity as between the date of succession and the date when issues of nationality were settled. With regard to the latter, it was felt that any subsequent resolution of such issues should be deemed to operate retroactively to the date of succession.

(vii) Scope of the topic ratione temporis

39. It was considered necessary to provide for a transitional regime to be applied while legislation on nationality was being prepared in a successor State or during negotiations with a view to agreement on the attribution of nationality following a succession of States or while the individual was exercising his right of option.

(viii) Respective roles of internal law and of international law in matters of nationality

40. There was broad agreement with the Special Rapporteur's contention that, while nationality was essentially governed by internal law, international law imposed certain restrictions - albeit few - on the discretionary power of States and that it was precisely this limited role of international law, in the specific context of State succession, which was to be the focus of the Commission's work. It was pointed out in this connection that under international law it should be possible to question certain negative effects of internal law on nationality in the event of a succession of States, such as statelessness and dual nationality. Support was also expressed for the concept of nationality for international purposes discussed in the report.

41. There was, however, also a view that the role played by international law, including human rights law, should not be overemphasized, since both literature and jurisprudence had recognized the exclusive character of the competence of the State in determining which individuals were its nationals.

42. With regard to the effects of international law on internal law in regard to nationality, the question was raised whether it would not be possible, in cases of extreme gravity, to claim, under international law, that acts carried out under internal law were null and void, such as the case where the decision to divest certain natural persons of their nationality was an element in the persecution of an ethnic minority.

(ix) The principle of effective nationality

43. Several members highlighted the importance of the principle of effective nationality. It was emphasized, in particular, that if a right to nationality was recognized there was still a need for a genuine link to be established between the person and the State of his nationality. The Commission, it was said, could help to pinpoint the concept of a genuine link more than the International Court of Justice had done in the Nottebohm4 case and, to that end, should be guided by the concept of "rules of attachment" or "criteria of attachment". It was also proposed that the criteria for establishing a genuine link for each different category of State succession should be studied. The remark was made in this context that an individual's emotional attachment to a particular country was an element that should not be overlooked.

44. There was also the view that, outside the framework of diplomatic protection, the principle of effective nationality lost its pertinence and scope, as was borne out, in particular, by the arbitral award in the Flegenheimer case and the judgement of the Court of Justice of the European Communities in the Micheletti case.

(x) Human rights considerations

45. A number of members stressed that the development of human rights law imposed new limits on the discretionary power of States with regard to nationality.

46. The principle of the right to a nationality was regarded as central to the work. A State succession, it was said, could not leave millions of people without a nationality, and it was therefore up to the international community to introduce rules whereby they would be recognized as having a nationality. Special emphasis was placed on article 15 of the Universal Declaration of Human Rights. It was also noted that the International Covenant on Civil and Political Rights reflected a marked reluctance to recognize a right to nationality as a general rule but that, under article 24, paragraph 3, every child was guaranteed the right to acquire a nationality; that raised the question whether there was not a distinction between the rights of adults and those of children in the matter. For those who favoured a broad interpretation of human rights, the right that children were recognized as having should, indeed, be extended to adults.

47. Other comments included the remark that, if there was a human right to a nationality, there should be a concomitant obligation on States to negotiate so that the persons concerned could acquire a nationality - an obligation the Commission should stress - as well as the observation that the relationship between the rights of minorities and nationality issues needed to be further explored.

48. In response to the suggestion that the Commission should address the problem of the existence, in certain States, of different categories of nationals, it was stated that the Commission should deal with the general concept of nationality and recall that international law imposed on all States obligations of non-discrimination, including in the area of nationality.

(xi) The right of option

49. The question was raised whether the right of option was recognized under contemporary international law and agreement was expressed, in this connection, with the Special Rapporteur's recommendation that the concept should be clarified. While the view was expressed that the Commission should, on the basis of State practice, endeavour to strengthen the right of option, it was also said that there could be no unrestricted free choice of nationality and that the factors which would indicate a choice was bona fide should be identified and the State must respect and give effect to them by granting its nationality.

(c) Comments of the Special Rapporteur following the discussion

50. In his summing-up of the discussion, the Special Rapporteur observed that the obligation on States to negotiate was not simply the counterpart of the right to a nationality but was also laid down in the 1983 Vienna Convention, which provided for the settlement of certain questions relating to succession by bilateral agreement and set forth certain general principles to be applied in that connection. As to the humanitarian aspect of the matter, the Special Rapporteur considered that it should not take precedence over other considerations. He also pointed out that it was not possible in the event of a collective change of nationality to apply automatically all the principles set forth in the human rights instruments in order to resolve individual cases. As to the final form of the Commission's work on the topic, he said that, if the Commission wished to lay down certain general principles for submission to States, a declaration would be the appropriate instrument, whereas if it concentrated on a specific area, for instance, statelessness, it could contemplate a more ambitious instrument or even an amendment or additional protocol to the Convention on the Reduction of Statelessness.

2. Consideration of the report of the Working Group under the topic

51. At the 2411th meeting of the Commission, the Special Rapporteur introduced the report of the Working Group (A/CN.4/L.507, annexed to this report). He explained that the Group had focused on the obligation of successor and predecessor States to negotiate and to resolve by agreement problems of nationality in a case of State succession - an obligation which appeared as a corollary of the right of every individual to a nationality - and had proceeded from the obligation of the States concerned to prevent statelessness. A prior

obligation was to consult in order to determine whether a change in the international status of a territory had undesirable consequences with regard to nationality. Thus, the obligation to negotiate did not have an absolute character.

52. The negotiations should address not only the problem of statelessness but also other issues related to the acquisition or loss of nationality (separation of families, military obligations, pensions and other social security benefits and the right of residence).

53. The Working Group had classified the various types of State succession in three groups, namely (i) cases of secession and transfer of part of a State's territory where the predecessor State continued to exist; (ii) cases of unification, including absorption where the predecessor State ceased to exist; and (iii) cases of dissolution where the predecessor State ceased to exist but more than one successor State emerged from the change. The specific circumstances of the natural persons whose nationality status would be affected had also been classified in a number of groups as indicated in paragraph 10 of the report. Paragraphs 11 to 20 contained the Working Group's conclusions on obligations and rights of predecessor and successor States. On the right of option, the Group's conclusions were reflected in paragraph 21 of the report.

54. As regards other criteria applicable to the withdrawal and grant of nationality, the Group had agreed that, while withdrawal of, or refusal to grant a specific nationality in hypotheses of State succession should not rest on ethnic, linguistic, religious, cultural or other criteria, a successor State should be allowed to take such criteria into consideration, in addition to criteria envisaged by the Working Group in paragraphs 12 to 21 of its report, for enlarging the circle of individuals entitled to acquire its nationality.

55. As to the consequences of non-compliance by States with the principles applicable to the withdrawal or the grant of nationality, the Working Group had, on a very preliminary basis, formulated certain hypotheses as reflected in paragraph 29 of its report.

56. Finally, the Working Group had examined the question of continuity of nationality. Bearing in mind that the purpose of the rule of continuity was to prevent the abuse of diplomatic protection by individuals acquiring a new

nationality in the hope of strengthening their claim thereby, the Working Group had agreed that the rule should not apply when the change of nationality was the result of State succession.

57. The Special Rapporteur added that the omission of the question of the nationality of legal persons should not be interpreted as reflecting unawareness on the part of the Working Group of the importance of the question.

58. In the course of the debate, the report of the Working Group was described as a concise and stimulating document of high calibre which reflected a great intellectual effort, provided a sound basis for further work, offered realistic solutions to a difficult problem and neatly categorized the issues and policies involved. The results achieved were viewed as more positive than might have been expected at such an early stage and in relation to a largely unexplored area and the remark was made that anyone reading the literature on nationality and State succession was bound to realize that the Working Group's efforts constituted a refreshing breakthrough.

59. Regret was, however, also expressed that the report should amount to little more than a summary of the Special Rapporteur's first report and fail to provide the concrete guidelines which the Commission needed to engage in practical work and move away from the realm of theory. Emphasis was placed on the need to provide concrete illustrations of the experience of States. Concern was expressed in this connection that too little attention should have been paid to the hardships associated with colonial situations, from which useful lessons could be drawn, and that an unduly prominent place should have been given to the experience of eastern European States. A comprehensive study of national legislation and State practice was viewed as all the more necessary as nationality involved economic, social, cultural and political aspects.

60. As regards the general approach to the work at hand, the remark was made that the topic involved both codification (inasmuch as fundamental human rights covered by jus cogens were involved) and progressive development (as far as matters of succession of States were concerned).

61. Some members noted that, instead of identifying "issues" and then proceeding to the formulation of recommendations to deal with such issues, the report listed a number of "obligations" which, in the view of the Working Group, should be

assumed by States to avoid statelessness. The remark was made that the Working Group should have clarified the sources and rules of law underlying such a system of "obligations" and indicated, wherever it found current law to be inadequate, the ways towards progressive development consistent with realistic expectations. Regret was also expressed that no answer should have been provided to the question whether any of those "obligations" corresponded to provisions in treaties, whether in force or not, nor to the question of how relevant State practice could be ascertained. Concern was expressed that to speak of obligations at the present early stage, before State practice or lex lata was clear, might cause confusion; if the Working Group's intention was to suggest guidelines on the basis of which certain lex lata could be developed by States themselves, it should not be speaking about hard obligations and rights.

62. With respect to the scope of the topic, some members regretted that the report of the Working Group was not more explicit on the subject of legal persons. This subject was viewed as important in practical terms and interesting from the legal standpoint, and as in much greater need of codification than was that of natural persons. The remark was made in this context that legal persons should not be allowed complete freedom to elect the nationality of the country in which they wished to carry out their activities. The members in question asked when the subject of legal persons would be taken up and noted that the Working Group, despite the terms of its mandate, had not provided a calendar of action. Other members took the view that the question of legal persons was a separate and highly specific one which should only be considered as a later stage. There was also a view that this question did not need to be dealt with by the Commission inasmuch as multinational corporations had the means to take care of their own interests.

63. The question whether the issue of dual nationality should be addressed under the topic gave rise to different views. It was considered, on the one hand, as of particular interest to certain developing countries because it was tied in with decolonization and, on the other hand, as irrelevant to the present exercise, which aimed at preventing statelessness resulting from State succession.

64. With reference to the statement in paragraph 4 of the report that every person whose nationality might be affected by the change in the international status of the territory had the right to a nationality and that States had the obligation to prevent statelessness, the remark was made that the principle of the individual's right to a nationality would undoubtedly come to be incorporated in many national legislations. It was also said that if the basic principle that States, including new States, were under an obligation to avoid statelessness in situations of State succession was not at present a rule of international law, it should be the aim of the Commission to make it one.

65. The obligation to negotiate/to resolve problems by agreement (paras. 5 to 7 of the report) was viewed by some members as a good starting point. Attention was drawn to concrete cases of State succession where the various problems had been resolved by arrangements - arrived at through consultation and diplomatic exchanges - that were humane yet entirely consonant with the national interest. It was also said that the obligation to negotiate was very important not only as a means of preventing statelessness but also with regard to all matters pertaining to State succession inasmuch as in the area of State succession the will of States as well as any agreements between them had to prevail. Specific comments on paragraphs 5 to 7 included (1) the comment that the obligation to negotiate went further than the obligation to consult "in order to determine whether the change in the international status of the territory had undesirable consequences with respect to nationality" (para. 5) and that States had an obligation to do everything possible to stabilize the territories concerned by providing "safeguards" for the population; (2) the observation that the issue of relations with third States was of particular importance and that the question arose whether the agreement referred to in paragraph 6 should be entered into by the predecessor State and the successor State alone or whether a third State closely concerned by a nationality problem should also be a party to such an agreement; and (3) the remark that the issues listed in paragraph 7 (dual nationality, military obligations and right of residence) had no direct bearing on legal provisions regarding nationality and should not therefore be among the issues which States were supposed to negotiate between themselves.

66. As regards paragraph 8 and subsequent paragraphs (dealing with guidelines for the negotiation between States concerned), the general remark was made that (1) care should be taken not to reverse the respective roles of the State and the individual.

67. With reference to the classification of persons affected by secession and transfer of part of a State's territory, contained in paragraph 10, concern was expressed that subparagraphs (a) to (b) seemed to confer on jus soli the status of a kind of peremptory norm of general international law, whereas subparagraph (c) dealing with acquisition of nationality on the basis of jus sanguinis was much more convoluted. The notion that persons had, by virtue of international law, the nationality of the territory in which they were born and could acquire a nationality by virtue of jus sanguinis could not, it was stated, be viewed as a rule of international law: instead nationality flowed from national laws within a general flexible framework posed by international law. The Commission was therefore invited to start from the premise that individuals had the nationality of the predecessor State and to avoid drawing firm distinctions about the way nationality was acquired.

68. The concept of "secondary nationality" referred to in paragraph 10 (e) and (f), paragraph 11 (d) and paragraph 14 (e) was queried by several members. The remark was made that this notion could only apply in the context of federal States (even though it was alien to many such States) and that it was confusing: the notion that there could be different degrees of nationality under international law and that nationality could refer to different concepts was viewed as questionable. It was also stated that if a person lived in a new State B and had the secondary nationality of that State, there was no reason why State A should be prevented from withdrawing its nationality at the end of a given period, and that the obligations upon the predecessor State under paragraph 11 (d) were perhaps too stringent.

69. As regards the categories of persons to whom the right of option should be accorded, the view was expressed that the circle of such persons should be restricted or at the very least leave out persons who had secondary nationalities. According to another opinion, an additional category of persons should be added, perhaps under section (a) (iii) (Obligation of the predecessor

and the successor States to grant a right of option), as follows: "Persons having acquired the nationality of a third State on the basis of the principle of jus sanguinis and residing in the successor State". Reservations were expressed on the reference in paragraph 14 (a) to "persons born in what had become the territory of the successor State and residing in ... a third State" and the criterion of residence in a third State was viewed as irrelevant in the case in point. Several members felt that a reasonable time-limit should be envisaged for the exercise of the right of option and that a time-frame should also be provided for in connection with the issues discussed in paragraphs 15 and 22 of the report.

70. As regards the legal basis of a right of option, the view was expressed that, while the granting of such a right was desirable, the notion did not necessarily reflect lex lata and pertained to the progressive development of international law. The title of section (c) (ii) "Obligation of the successor State to grant a right of option" was therefore viewed as misleading and furthermore inconsistent with the use of the word "should" in paragraph 21.

71. With respect to the question of the scope of the right of option, addressed in section 3 of the report, several members cautioned against an unduly broad approach. The right of option, it was stated, dealt with a very precise matter, the possibility of making either a positive choice or renouncing a nationality acquired ex lege. Emphasis was also placed on the need not to reverse the roles: State succession was a matter for States and, notwithstanding legitimate human rights concerns, it was questionable whether the will of individuals could or should prevail in all cases over agreements between States as long as such agreements fulfilled a number of requirements. The view was also expressed that the last sentence of paragraph 23 which read "States should ... not be able, as in the past, to attribute nationality by agreement inter se against an individual's will" raised the question of the device (plebiscite, questionnaire, etc.) through which States would be expected to consult individuals.

72. Some members, however, took the view that the right of option was anchored in the structure of international law and should, in the context of State succession, be considered as a fundamental human right similar to the right to freedom. It was also said that the right of option of the individual should not

be subject to the right of the State to determine nationality and that the State should exercise its right in the interest of nation-building judiciously, bearing in mind, for instance, the principle of the unity of the family.

73. Section 5 of the report, on the consequences of non-compliance with the principles applicable to the withdrawal or the grant of nationality, was viewed by several members as calling for further reflection. The remark was made that the focus should be on codification of issues pertaining to State succession and not on codification of issues relating to nationality and that, by veering off, as it did in paragraph 29, into issues of nationality, the Working Group was taking considerable risks, in particular by according third States the right to judge the actions of predecessor or successor States which had failed to comply with the principles applicable to the withdrawal or granting of nationality. No principle of international law, it was stated, enabled a third State to interfere in problems which a priori concerned the predecessor and successor States alone.

74. With reference to paragraph 30, the remark was made that although the principles governing international responsibility would apply automatically, they would not suffice, since they governed only inter-State relations.

75. As for section 6, the distinction made in paragraph 31 (a), (b) and (c) was viewed as unnecessary since the Working Group's conclusion set out in paragraph 32 was that, in any event, the rule of continuity did not apply in the context of State succession.

76. Other comments included (1) the remark that allowing a successor State, as provided in paragraph 27, to take into consideration ethnic, linguistic, religious, cultural or other similar criteria for the purpose of allowing more categories of individuals to acquire its nationality might lead to improper use of those criteria and open the way to discrimination; (2) the observation that the Commission should use prudence in invoking the Nottebohm precedent, which related to naturalization, and (3) the remark that, since the problem of nationality and particularly of statelessness was primarily of concern to the individual, who might be left in a difficult situation for many years if the traditional method of recourse to the ICJ was followed, dispute settlement arrangements including arbitration, or, possibly, recourse to the Human Rights

Committee should be envisaged with a view to reaching a decision within a reasonable period of time.

77. Responding to the comments made, the Special Rapporteur noted with satisfaction that the debate had confirmed a degree of consensus on the obligation to prevent statelessness in cases of State succession and the obligation of the States concerned to negotiate to that end. The report was preliminary in character and the Working Group intended to complete its mandate next year. The question of legal persons had not been touched upon because the Special Rapporteur's report did not contain enough material on the matter for a meaningful discussion. The working out of a calendar of action would similarly have to await the completion by the Working Group of the consideration of all the issues at hand. In this connection, the Special Rapporteur pointed out that the Working Group had had little time at its disposal during the current session and that it had none the less been able to propose preliminary conclusions or hypotheses in response to questions posed in the Special Rapporteur's report.

78. While agreeing that not everything in the Working Group's report was lex lata and that using the term "obligations" when speaking of guidelines was inappropriate, the Special Rapporteur pointed out that not all the principles mentioned should be regarded as principles of a merely supplementary character from which the States concerned were free to derogate by mutual agreement. Thus the fundamental principle - preventing statelessness - could not be at the discretion of States: imposing on States an obligation to negotiate and allowing them to leave millions of persons stateless as a result of those negotiations was unacceptable. He agreed on the need to fix reasonable time-limits for the exercise of the right of option. As for dual nationality, it could not admittedly be prohibited, but the guidelines were not stringent in this respect and allowed States to choose their own policy.

79. The term "secondary nationality" had been used for lack of a better one: it referred not to nationalities that had international validity but to a link between a federated entity and the individual that was of relevance for domestic law. Difficulties in this area stemmed from the different degrees of "federalization" of States.

80. The criticism relating to an alleged overemphasis on jus soli did not seem valid: while it was true that the criteria used by the Working Group to define the categories of persons listed in subparagraphs (a) to (c) of paragraph 10 were those customarily accepted by the countries governed by jus soli, the fact of birth had systematically been considered in the Working Group in conjunction with the criterion of the place of habitual residence. Furthermore the Working Group's conclusions gave a more prominent place to the fact of national residence than to the fact of birth.

81. With regard to the right of option, the view the Working Group had intended to convey was that, in relation to the categories of persons identified in paragraph 21 of the report of the Working Group, it was no longer possible to defend the absolute freedom of the State to decide the question of nationality without any regard for the will of the individual concerned; that did not imply that the individual's will had to be taken into consideration in relation to all categories of individuals whose nationality was affected by a succession of States.

82. The concern that the conclusions in paragraph 27 (see supra para. 76 (1)) might open the way to discrimination required further study. Nevertheless, the conclusions of the Working Group were supported by some international jurisprudence.

83. As regards the objections to which section 5 had given rise (see supra para. 73), the Special Rapporteur stressed that the Working Group was merely presenting working hypotheses which merited further study.

84. As for the comment on section 6 reflected supra in paragraph 75, the Special Rapporteur indicated that the distinction in question had been made in order to show that the Working Group had reviewed carefully all the issues arising from the rule of continuity, before coming to its conclusion.

85. The Special Rapporteur indicated that he intended to present at the next session a report which would consist of three sections: the first would build on the report of the Working Group, taking into account the practice and doctrine relating to the nationality of natural persons, the second would address the issue of legal persons, and the third would deal with the form which the outcome of the work could take (comprehensive report containing guidelines, draft

declaration, optional protocol to the Convention on the Reduction of Statelessness, etc.).

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REPORT OF THE PLANNING GROUP

Programme, procedures and working methods of the Commission and its documentation

1. At its 2378th meeting, on 2 May 1995, the Commission noted that, in paragraph 8 of resolution 49/51, the General Assembly had requested it:

> "(a) To consider thoroughly:
>
> (i) The planning of its activities and programme for the term of office of its members, bearing in mind the desirability of achieving as much progress as possible in the preparation of draft articles on specific topics;
>
> (ii) Its methods of work in all their aspects, bearing in mind that the staggering of the consideration of some topics might contribute, inter alia, to a more effective consideration of its report in the Sixth Committee.
>
> (b) To continue to pay special attention to indicating in its annual report, for each topic, those specific issues on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest for the continuation of its work."

2. The Commission agreed that this request should be taken up under item 8 of its agenda, entitled "Programme, procedures and working methods of the Commission and its documentation", and that this agenda item should be considered in the Planning Group of the Enlarged Bureau.

3. The Planning Group held four meetings. It had before it the section of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-ninth session, entitled "Other decisions and conclusions of the Commission" (A/CN.4/464/Add.2, paras. 90-98). Mr. Hans Corell, Under-Secretary-General, The Legal Counsel, addressed the Planning Group at its first meeting.

Planning of the activities for the remainder of the quinquennium

4. The current programme of work consists of the following topics: State responsibility; draft Code of Crimes against the Peace and Security of Mankind; International liability for injurious consequences arising out of acts not prohibited by international law; The law and practice relating to reservations to treaties; and State succession and its impact on the nationality of natural and legal persons.

5. In accordance with paragraph 8 (a) (i) of General Assembly resolution 49/51, the Planning Group considered the planning of the Commission's activities for the last year of the current term of office, bearing in mind, as requested by the resolution, the desirability of achieving as much progress as possible in the preparation of draft articles on specific topics.

6. The Planning Group recognizes that it is impossible to adopt a rigid schedule, but recommends that the Commission should set goals in planning its activities.

7. Taking into account the progress of the work achieved on the topics in the current programme, as well as the possibilities of making further progress, and bearing in mind the different degrees of complexity of the various topics, the Planning Group recommends that priority should be attached at the next session, particularly in the Drafting Committee, to the draft Code of Crimes against the Peace and Security of Mankind and to the draft articles on State responsibility, the goal being to complete, by the end of the current term of office, the second reading of the draft articles on the first of those topics and the first reading of the draft articles on the second of those topics. Since the second reading of the draft Code is already at quite an advanced stage, the Planning Group is of the view that most of the time should be set aside at the next session for the topic of State responsibility. It recommends, in particular, that a maximum of time should be allocated in the Drafting Committee to considering the draft articles on State responsibility that are pending before it. With reference to the topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law", the Planning Group recommends that the Commission should make every effort to complete by 1996 the first reading of the draft articles on activities that risk causing transboundary harm. As regards the topic "State succession and its impact on the nationality of natural and legal persons", the Planning Group is of the view that the Working Group established at the present session should be reconvened at the next session for the purpose of continuing its work; the Commission would then be in a position to submit to the General Assembly various options as to the form which

the outcome of its work on the topic should take, thereby responding to the request contained in paragraph 6 of Assembly resolution 49/51. The schedule of work would be established in the light of the General Assembly's reaction. As to the topic of "The law and practice relating to reservations to treaties", the Planning Group, like the Special Rapporteur, considers that the Commission's work could cover a period of five years as from 1995 and lead to a guide to practice, containing, where necessary, model clauses, rather than to a set of draft articles. It recommends that, on this topic and the topic of "State succession and its impact on the nationality of natural and legal persons", the Commission should make all possible progress at its next session.

8. The Planning Group is of the view that, in order to meet the goals it has set for itself as described in paragraph 7 above, the Commission should, as an exceptional arrangement, allow for at least three weeks of concentrated work in the Drafting Committee at the beginning of the forty-eighth session.

Long-term programme of work of the Commission

9. Bearing in mind that some of the topics on its agenda had reached an advanced stage and that it was therefore time to give some thought to the programme of work for the next five-year term of office, the Commission re-established the long-term Working Group set up in 1993.

10. The Working Group, which was open-ended, was again chaired by Mr. Derek Bowett.

11. In the report which it submitted to the Planning Group, the Working Group stated that it had reviewed a number of topics 1/ and had reached the conclusions reflected below.

12. On the proposal of the Working Group, the Planning Group recommends to the Commission the topic of "Diplomatic protection". The Planning Group noted that work on this topic would complement the Commission's work on State responsibility and should be of interest to all Member States. It could cover the content and scope of the rule of exhaustion of local remedies, the rule of nationality of claims as applied to both natural and juristic persons, including its relation to so-called "functional" protection, and problems of stateless persons and dual nationals; and it could consider the effect of dispute settlement clauses on domestic remedies and on the exercise of diplomatic protection.

13. The Planning Group also noted the recommendation of the Working Group that work in the nature of a "feasibility study" should begin on a topic concerning the law of the environment. The Working Group had since 1993 considered sympathetically topics such as "Global commons" and "Rights and duties of States

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1/ Namely, the topics identified in 1993 (A/CN.4/453), plus the following three topics: diplomatic protection, shared (or transboundary) resources and international recognition.

for the protection of the environment", and the newly-suggested topic of "shared (or transboundary) resources" also had environmental implications. The Working Group believed some preliminary work

would be needed before the precise topic, and its content, could be determined, and for this reason, as regards this topic, the Working Group had recommended that more preparatory work should be undertaken.

14. In that light, and on the proposal of the Working Group, the Planning Group recommends that the Commission should insert the following paragraph in its report to the General Assembly:

> "The Commission notes significant progressive development of international law in the various sectors in the field of the environment since the 1972 Stockholm Declaration on the Human Environment. The sector by sector approach so far adopted in the conclusion of various treaties nevertheless involves the risk of losing sight of the need for an integrated approach to the prevention of continuing deterioration of the global environment. The Commission accordingly considers it appropriate to take up the subject of international global environmental law. However, as the subject is substantive, wide and complex, it desires to be authorized, as a first step, to conduct an extensive feasibility study of the topic entitled provisionally as 'Rights and duties of States for the protection of the environment', so that it would be in a position, after such a study, to recommend to the General Assembly the exact scope and content of the future topic. The feasibility study would encompass general principles, substantive and procedural rules, and measures for the implementation of obligations for the protection of the global environment. The Commission intends to focus more on the field of duties erga omnes where the real complainant of deterioration of the environment is the international community at large rather than individual States, and thus the study would include the topic of 'Global commons' as well. It would also cover the environmental aspect of the utilization of 'shared (or transboundary) resources'. The Commission would avoid duplication of the work being performed by it under the topic of 'International liability for injurious consequences arising out of acts not prohibited by international law'".

Working methods

15. At its last session, the Commission expressed the intention to review the conditions under which the commentaries are discussed and adopted, with a view to the possible formulation of guidelines on the matter. For lack of time, it was not able to discuss all aspects of the question. It agreed, however, that it was desirable for commentaries to draft articles to be taken up as soon as possible in the course of each session in order to receive the requisite degree of attention and, in any case, to be discussed separately rather than in the framework of the adoption of the Commission's report to the General Assembly.

16. At the present session the Planning Group took up the matter again.

17. With reference to the content of commentaries, the Planning Group wishes to draw attention to article 20 of the Commission's Statute, which reads as follows:

"Article 20

The Commission shall prepare its drafts in the form of articles and shall submit them to the General Assembly together with a commentary containing:

(a) Adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrines;

(b) Conclusions relevant to:

(i) The extent of agreement on each point in the practice of States and in doctrine;

(ii) Divergencies and disagreements which exist, as well as arguments invoked in favour of one or another solution."

18. The Planning Group is aware that the content and length of the commentaries accompanying draft articles depend partly on the nature of the topic and the extent of the "precedents and other relevant data, including treaties, judicial decisions and doctrine". It none the less recommends that the Commission should encourage the Special Rapporteurs to draft the briefest possible commentaries and to include in them only elements which will make the text of the articles easier to understand and apply. It emphasizes in this connection that commentaries perform a function different from that of the reports by the Special Rapporteurs and that the reports are easily accessible, since they are reproduced in the Commission's Yearbook.

19. The Planning Group also considers it desirable for the commentaries to the various draft articles by the Commission to be as uniform as possible in presentation and length. It recommends that the Commission's Rapporteurs should pay due attention to this matter.